

The Proper Purpose Test—What You Need to Know

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Overview

The Companies Act 2006 (“**2006 Act**”) introduced controls on the rights of a person to access a company’s register of members and provided that any such request must be for a “proper purpose”. The phrase “proper purpose” however has not been defined in statute. A company can only refuse a request to access its register of members by applying to court and it must make its application within five working days of receipt of the request.

The lack of clarity over what constitutes a proper purpose alongside the administrative burden of having to apply to court within a short space of time to refuse a request has created problems for company secretaries and officers on the receiving end of such requests which are made under section 116 of the 2006 Act.

Guidance published by the Institute of Chartered Secretaries and Administrators (“**ICSA**”) has previously been issued on the meaning of “proper purpose” and recent case law has further developed the position and may well have made the company secretaries’ job just a little easier. In anticipation of the ICSA guidance being updated we consider the position.

New Insights: The “Proper Purpose” Test

Background

Every company is required to keep a register of members; that is, a register of who the shareholders of the company are and what shares they hold. Before the 2006 Act came into force, any person who paid the prescribed fees could gain access to the register and furthermore a company’s shareholders could also be identified through its annual return. However, the old regime was open to abuse and it had been known for example for pressure groups to gain access to the register of members to harass and intimidate shareholders of companies they were targeting and unduly influence them in an attempt to meet their sociopolitical goals.

Accordingly, to reform the regime, the 2006 Act introduced restrictions on the rights of a person to access a company’s register of members. Under the 2006 Act, a person requesting access to the register must now state

the purpose for which the information retrieved will be used. In so doing, they must satisfy the “proper purpose test”.

If the receiving company believes that the request is not for a proper purpose, it must apply to the court for a “no-access” order within five working days of receipt of the request. It is then within the court’s jurisdiction to determine whether, on a balance of probabilities, the request was not made for a proper purpose. A company cannot therefore simply decline a request under section 116 and only has a relatively short amount of time to apply to the court for permission to refuse a request.

As the phrase “proper purpose” has not been defined by the 2006 Act, it remains up to the company secretary or the board of directors to interpret whether an application has been made for a proper purpose with the assistance of industry guidance. While it is clear that harassing and intimidating shareholders would not constitute a proper purpose and the guidance issued by ICSA in January 2014 makes this clear, the recent cases of *Burry v Knight* [2014] and *Burberry Group plc v Richard Charles Fox-Davies* [2015] have further developed what constitutes “proper purpose”.

Developing the Scope of “Proper Purpose”

The current guidance issued by ICSA provides numerous examples of what constitutes “proper” and “improper”. That said, the guidance is non-exhaustive and non-binding.

Under the guidance non exhaustive illustrative examples of a proper purpose for access are focused around the protection of a shareholder’s rights or pursuant to a legal process. Examples include a shareholder wanting to contact another shareholder to garner support for a requisition; a person wanting to contact a shareholder to encourage an exercise of member rights under the 2006 Act; the enforcement of a judgement; or administrators seeking to identify title to assets. Under the guidance, an improper purpose might include any purpose not related to the shareholders in their capacity as shareholders of the company (e.g. commercial mailings) or any purpose that is unlawful.

Recent perspectives from the court

In a development to the ICSA guidance, we consider that the key points to be taken from *Burry v Knight* and *Burberry Group plc v Richard Charles Fox-Davies* are as follows:

- There is no exhaustive definition of “proper purpose”; it must be given its ordinary, natural meaning.
- In deciding what is a “proper purpose”, a court might have regard to the guidance issued by ICSA. As such, a company should consult the same guidance when deciding whether a request is proper.
- Where the person making the request is pursuing matters which are now stale, the purpose may not be proper.
- Where the proposed communication will be of no possible benefit to the company or to its shareholders or is of no real value to shareholders, the purpose may not be proper.
- A proper purpose must be relevant, in some way, to the shareholders’ interests as shareholders of the company.
- Where there are multiple purposes – some proper and some improper – the company is not obliged to provide access.
- There is a difference between applications for access by shareholders and applications for access by non-shareholders. Where a shareholder seeks access, the shareholder would more likely be granted access if his purpose in seeking access relates to his rights as a shareholder. Where a non-shareholder makes a request, the emphasis switches to the protection of the company’s shareholders. This may also include protecting them from commercial exploitation (e.g. mailings from third party companies that do not otherwise fit within proper purpose qualifying criteria).

Comment

Protection, in relation to access to the register of members, has been afforded to a shareholder in the 2006 Act by way of the proper purpose test. The protection of a shareholder continues to be important but now the courts also seem to be placing greater weight on whether granting access to a company's register would in fact be "of benefit" to the shareholder. It is not clear however whether this benefit relates solely to his legal rights as a shareholder or whether it can include a benefit of a commercial nature.

In determining whether there is a proper purpose, companies should seek guidance from the recent case law and continue to consult the ICSA guidance. Given the short time-frame in which companies are required to either provide access to the register or apply to the court for an order, a decision as to whether there is a proper purpose should be made promptly (there are financial sanctions for non-compliance). As the matter is time-sensitive, companies are encouraged to put guidelines in place as to what constitutes a proper purpose and ensure that it has established procedures to deal with a request as and when it comes in.

Upon receipt of a section 116 request, the burden of proof is on the company to demonstrate (on balance of probabilities) that the request is for an improper purpose. As such in practice it will often be the case that a company will be required to comply with such a request if it has no proof that the purpose of the request is improper. Depending on the facts, this in itself could constitute an adequate defence to a claim that a shareholder has been approached for an improper purpose.

If there is doubt as to whether a purpose is proper, companies should undertake further enquiries as are reasonably possible within the time available and it should be made clear to the person seeking access that failure to provide the information within the remainder of the five days might trigger an application to court because there is no flexibility under the law.

Directors should also be mindful of their duties under the 2006 Act – if, after conducting enquiries, they are of the view that the request for access may not be for a proper purpose, and in particular, this is a unanimous view held by all the directors, then a court application should be made. Provided that it is satisfied on a balance of probabilities that the purpose is not proper, the court will then relieve the company from any obligation to comply with an access request.

Companies should also remain mindful of **data protection laws**. Every company has a duty to ensure that personal data in its control is not disclosed unlawfully or unfairly. As such, companies should ensure the purpose for the request is proper in order to avoid claims for damages from shareholders that their data protection rights have been infringed. It is also considered best practice to avoid providing access to the entire register in a case in which access to a single or a limited number of entries would suffice.

A foreseeable area for conflict is where a company secretary or other officer reasonably believes a purpose of a section 116 request to be proper, but where in actual fact the result is that a shareholder, by being contacted by the requesting party contests that the purpose was not a proper one and accordingly alleges that his data protection rights have been infringed.

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